

TRANSPORTATION REPORT

From:

Terry Whiteside,
Whiteside & Associates,
Billings, Montana



To: The Montana Wheat & Barley Committee

Date: July 31, 2009

Key House Panel Overwhelmingly Votes To Close Monopoly Loopholes For Big Railroads, Protect Consumers

A key House panel today took a significant step forward to protect American jobs and keep more money in the pockets of consumers by seeking to close the monopoly loopholes that exempt big railroads from antitrust regulation.

Adding to growing momentum in Congress for action on behalf of consumers, the U.S. House Judiciary Subcommittee on Courts and Competition Policy passed by voice vote July 30th H.R. 233, the Railroad Antitrust Enforcement Act of 2009.

The bill now awaits consideration by the full Judiciary Committee which is expected after Congress returns from the August recess. Action is also underway in the Senate, where Commerce Committee Chairman John D. Rockefeller, IV (D - WV) and Senator Herbert Kohl (D - WI) have vowed to work together to include the repeal of railroad antitrust exemptions in the forthcoming rail reform legislation being crafted by the Commerce Committee.

"This is an important step toward finally closing the railroad monopoly loopholes that have hurt American consumers, farmers, job growth, and our economy for too long. This bill will rein in monopoly pricing power and help manufacturers protect and create more jobs. It's exactly the kind of no - cost economic stimulus we need right now," said Glenn English, Chairman of Consumers United for Rail Equity. Currently, freight rail companies enjoy a major loophole

which exempts them from U.S. antitrust laws, setting them apart from nearly every other American industry.

Railroads are instead regulated solely by the Surface Transportation Board, which has historically allowed the railroad industry to exploit antitrust exemptions at the expense of their customers, and ultimately, consumers across the nation. In 2004, the Bush Administration's Justice Department told Congress it opposed "sector - specific exemptions to the antitrust laws."

The Railroad Antitrust Enforcement Act has recently garnered support from U.S. Assistant Attorney General for Antitrust Christine Varney, 20 state Attorneys General, the American Bar Association, the National Industrial Transportation League and the Consumer Federation of America and the Alliance for Rail Competition.

Pace Quickens - On A Shipper/Rail Regulatory Reform Act

Senator Thune (SD) sees progress on STB, shipper, and rail reform bill, but "we're not there yet," as reported by the Journal of Commerce's John Boyd.

Sen. John Thune, S.D., ranking Republican on the surface transportation subcommittee, said it will be "a stretch" for key lawmakers and industry groups to get a deal in principal on reforms in rail regulation before the Senate breaks for its August recess.

Thune, who was also once his state's railroad director, told the Journal of Commerce although it is still possible to have stakeholders and key lawmakers agree to the outlines of a deal before the Aug. 10 recess "I don't know that we're going to be in that position."

He said with so much other business before the full Senate and the Commerce, Science and Transportation Committee that is trying to craft the rail legislation, "I think getting that kind of agreement, even in principal, is going to be a bit of a stretch" before the scheduled month long recess begins Aug. 10.

That echoes a recent comment by James R. Young, Union Pacific Railroad's chairman, president and CEO. He told analysts in a July 23 discussion of UP quarterly earnings that "nothing will happen before the August recess" on rail regulation in the Senate. Young also suggested it might not even develop this year.

Other Washington sources say behind-the-scenes talks involving railroads and shipper groups have continued with key senators and their staffs, so that a detailed regulatory reform outline could emerge soon even though legislative language might take weeks longer. That could put a bill before the Commerce Committee soon after it returns in September.

Senator Thune left the door open for near-term action, though he did not expect it. "It's come a long ways, I think, at least in terms of discussions, but I don't think we're there yet," he said. "We're getting closer, but I don't think we're there yet."

Some sources stress though, that this will be a legislative agreement between key senators rather than a deal between shippers and railroads that have been in separate talks with Capitol Hill.

The bill, which would reauthorize the Surface Transportation Board while trying to reshape its mandate to settle longstanding shipper complaints over rail regulation, is a project of Sen. Jay Rockefeller, D-W.Va., who chairs the Commerce Committee, and Sen. Frank Lautenberg, D-N.J., who chairs the subcommittee.

Sen. Kay Bailey Hutchison, R-Texas, is the ranking Republican for the full committee, so she and Thune for the subcommittee are in the leadership group for the bill. Senator Dorgan has also been active, participating with Committee staffers in shaping the pre-legislative discussions.

"We're edging our way to it," Lautenberg said this week.

In June, Rockefeller also said the bill that emerges will address rail antitrust issues, after separate legislation that would have removed a limited exemption railroads enjoy was pulled from the Senate floor the same day it was slated for debate so it could be merged with the STB reauthorization.

"Everybody's got ideas about how to fix some of the issues that exist there," Thune said, "how to make the STB work better, create a better process for deciding some of these difficult cases and also providing better access for shippers, trying to keep costs at reasonable levels."

Some sources predict the bill will increase the STB from its current three-person board to five, and boost the agency's funding for a stronger regulatory role.

Thune said "there is a resource issue there when it comes to manpower, which hopefully can be addressed. I don't know that we'll be expanding the size of the board, although that's a point of debate and everybody talks about the possibility of that."

Senate Commerce Committee Holds Hearing on Dan Elliot - Nominated to be the new Chairman of the STB

In his opening statement on Wednesday July 29th, Chairman Rockefeller said that he has concerns about the railroads' treatment of captive railroad shippers—both with regard to the rates they charge and the service they provide. In his opinion it has been an entirely one-sided game over the past 20 years with everything on the side of the railroad and very little on the

side of the shipper. In his written testimony, he noted “the STB is supposed to be a neutral venue for captive shippers to seek relief when they have been wronged by the railroads, but I am concerned about the agency’s capacity to play that role. As I work with Senators Hutchison, Lautenberg, and Thune to reauthorize the STB for the first time since it was created in 1996, we are evaluating the agency from top to bottom.”

Ranking Member Hutchison said in her opening statement that she is working with her colleagues on the Committee to draft compromise STB reauthorization legislation that will be balanced. Both captive shippers and railroads are very important to our economy.

In Mr. Elliot’s opening statement, he pledged to be open minded and a fair decision maker. He is aware of the contentious relationship between captive shippers and railroads, but he is not coming in with a preconceived notion of who is right and who is wrong. He will be responsive and accessible and will work with his fellow commissioners to find balanced solutions. In his written testimony, Mr. Elliot noted “Mr. Chairman, I applaud your longstanding interest and efforts in making the Board’s processes fair to both shippers and railroads. I share your belief that the STB should always be impartial, balanced and open-minded in carrying out the law... I pledge to use my position to bring more harmony to the often contentious relationship between shippers, who need to compete in an increasingly competitive global marketplace, and railroads, which need the necessary revenues to maintain our nation’s vital rail infrastructure...If confirmed, I would focus the Board’s resources on bringing shippers and railroads together to promote more collaborative, less formal, efforts to provide better rail service. I would allow more light to shine on the Board’s work by improving communications and public outreach.”

Question and answer highlights:

Chairman Rockefeller and Ranking Member Hutchison were the only Members present for questions.

Chairman Rockefeller expressed his surprise that Mr. Elliot does not have “a preconceived notion of who is right and who is wrong” because there are points that are right and there are points that are wrong (he cited that shippers have been blackmailed, had shipments held up and prices raised because they are served by only one railroad). The Chairman also said that when it comes down to the issue of captive shippers, if anything stands out it is that there has been no neutrality at the STB in the past because the laws have not been applied properly. Railroads set rates however high they want and shippers get run down trying to fight them, noting that Class I’s have the power and that is not neutral. He also said “I want you to be fair, but I do not want you to be neutral.”

Mr. Elliot responded to Chairman Rockefeller’s concerns by saying he does not come from the view point of either the shipper or the railroad and he intends to take a careful look at the situation.

Ranking Member Hutchison said that it has recently come to light that the STB provided flawed data that overstated rail rates in the Christensen Study. She asked Mr. Elliot what action he would take to address that issue.

Mr. Elliot responded that he was under the impression the STB is working to correct that situation and as a member of the Board he would not want to rely on flawed data. Chairman Rockefeller told him that he hopes that he "charge into the middle of that hornets' nest because the issue won't settle itself."

The nominee to head the agency that regulates the railroad industry said he would be "proactive" in addressing shippers' allegations of pricing abuses by freight-rail companies, and indicated that a law that deregulated the industry is outdated.

The comments by Daniel R. Elliott III came as a House Judiciary subcommittee approved a bill Thursday that would eliminate exemptions from antitrust law for commercial railroad companies. The bill, introduced earlier this year by Rep. Tammy Baldwin (D., Wis.), could face a hearing and a vote by the full committee as early as September. He also added, that shippers' concerns that the law has eroded competition and given railroads too much pricing power have been heard "loud and clear."

Editor's Note: The STB announced Thursday, July 30th that the Christensen team is going to update the Christensen report with 2007 and 2008 data and other technical's - both the shipper and the carriers faulted the original study - the shippers felt the data did not reflect the rapidly increasing rail rate levels of 2007 and 2008 on the one hand and the railroads complained that the rail rates reflected in the 2006 data did not show accurate rail rates and the rail rates of 2006 overstated actual rates - which is the opposite position claimed by the shippers. In 2007 and 2008, the railroads nationally increased most rates in an attempt to increase earning levels and also to offset falling levels of demand in late 2008.